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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

Estate of Allen E. Paulson, Deceased.	
Madeleine Paulson,	D048549
Plaintiff and Respondent,	(Super. Ct. No. PN24815)
v.	
J. Michael Paulson, Trustee,	
Defendant and Appellant.	

APPEAL from an order of the Superior Court of San Diego County, Yuri Hoffman, Marguerite L. Wagner, Judges. Affirmed.

J. Michael Paulson, as trustee of the Allen E. Paulson Living Trust u/d/t December 23, 1986 (Trustee), appeals from a probate court order denying his motion for contractual prevailing party attorney fees and costs on grounds it lacked subject matter jurisdiction. The court entered its order on remand after this court held the probate court did not have subject matter jurisdiction to enforce a settlement agreement entered into between

Trustee and respondent Madeleine Paulson (Madeleine). Conceding the probate court lacked subject matter jurisdiction to summarily enforce the parties' settlement agreement, on appeal, Trustee contends the court nevertheless had fundamental subject matter jurisdiction to award him his attorney fees as recoverable costs of suit. We disagree, and affirm the order.

FACTUAL AND PROCEDURAL HISTORY¹

Trustee and Madeleine entered into a settlement agreement and general release of various claims (the settlement agreement) and withdrew with prejudice the probate petitions on which the claims were based. Thereafter, Madeleine successfully moved under Code of Civil Procedure section 664.6² to enforce the settlement agreement as to certain matters (specifically, her interest in a breeding syndicate for a stallion named Theatrical) that were not referenced in the settlement agreement. Trustee appealed from the court's judgment under section 664.6, in part arguing that after the parties dismissed their petitions with prejudice, the probate court was divested of jurisdiction to enforce the

¹ We take judicial notice of this court's prior unpublished opinion in this case, *Paulson v. Paulson* (June 20, 2005, D044801) [nonpub. opn.]. Some of the factual background is summarized from that opinion. Because appellant and respondent have the same surname, we refer to appellant as Trustee and respondent as Madeleine.

² All statutory references are to the Code of Civil Procedure unless otherwise indicated. Section 664.6 provides: "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement. If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement."

settlement agreement. In an unpublished opinion, this court reversed the judgment. (*Paulson v. Paulson, supra*, D044801.) We held the probate court had no jurisdiction to hear Madeleine's section 664.6 motion because the record did not contain a clear and ambiguous request that the probate court retain jurisdiction following entry of the required withdrawals of the probate petitions, and the court did not otherwise retain jurisdiction on its own to summarily enforce the terms of the parties' settlement agreement.³ (*Ibid.*) We directed the probate court to deny Madeleine's motion for lack of subject matter jurisdiction and awarded Trustee costs on appeal. (*Ibid.*)

Trustee thereafter filed an appellate cost memorandum and a motion in the probate court for a judgment denying Madeleine's motion to enforce the settlement agreement and awarding him \$210,365.70 in attorney fees and \$10,176.83 in costs apart from otherwise specified costs of appeal. With respect to attorney fees, Trustee argued they were recoverable under Civil Code section 1717 and Code of Civil Procedure section 1033.5, subdivision (a)(10)(A) because the settlement agreement provided for recovery of attorney fees to a prevailing party "[i]n the event of any litigation between the Parties to

³ In so holding, we observed Madeleine was not prevented from bringing a separate action to enforce her interpretation of the settlement agreement. (*Paulson v. Paulson, supra*, D044801.) On this appeal, Madeleine has asked that we take judicial notice of Trustee's reply brief in the prior appeal, as well as other court filings showing she has filed a separate breach of contract complaint that was later removed to federal court and transferred to the Eastern District of Kentucky. She contends in the event we conclude the probate court has subject matter jurisdiction over Trustee's attorney fee motion, these items are relevant to demonstrate neither party has yet prevailed on the contract. While we grant Madeleine's request, it does not change our decision as we do not reach the issue of prevailing party status.

enforce any of the provisions of [the settlement agreement] or any right of any Party arising out of [the settlement agreement]"4 Trustee asserted Madeleine's section 664.6 motion "constituted litigation seeking to enforce purported provisions of the Settlement Agreement within the meaning of [the settlement agreement]." In opposition, Madeleine argued this court's opinion was law of the case establishing that the probate court lacked subject matter jurisdiction over the settlement agreement dispute, and that under *Wackeen v. Malis* (2002) 97 Cal.App.4th 429, the probate court also necessarily lacked jurisdiction for purposes of determining Trustee's entitlement to attorney fees because it would be required to interpret and enforce the settlement agreement. She argued alternatively that Trustee was not a prevailing party, and his fee request was unreasonable.

Pursuant to this court's direction, the probate court denied Madeleine's motion to enforce the settlement agreement. Stating no reasons, the court also denied Trustee's request for attorney fees, granted his request for appellate costs of \$562, and denied Trustee's request for the remaining costs. Trustee appeals from that portion of the order denying his motion for attorney fees and non-appellate costs.

4 In full, paragraph 41 of the settlement agreement provides: "**Recovery of Attorneys' Fees and Costs.** In the event of any litigation between the Parties to enforce any of the provisions of this Agreement or any right of any Party arising out of this Agreement, the unsuccessful Party to such litigation agrees to pay to the prevailing Party all costs and expenses, including reasonable attorney's fees incurred by the prevailing Party, all of which shall be included in and be a part of the judgment rendered in such litigation. For purposes of this Agreement, the term 'litigation' shall include all forms of dispute resolution before a neutral third party, including, without limitation, mediation, arbitration, and courtroom proceedings."

DISCUSSION

I. *Standard of Review*

Trustee states, and Madeleine does not contest, that the issues presented on this appeal are questions of law and that our standard of review is de novo. When the jurisdictional facts are not in dispute, whether a court has subject matter jurisdiction is a legal question subject to de novo review. (*Dial 800 v. Fesbinder* (2004) 118 Cal.App.4th 32, 42; *Robbins v. Foothill Nissan* (1994) 22 Cal.App.4th 1769, 1774.) Here, the probate court did not resolve any factual disputes between the parties and thus we independently consider the legal questions related to the court's jurisdiction.

As for the court's attorney fee ruling, we normally apply the abuse of discretion standard. (*Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 142.) "However, de novo review of such a trial court order is warranted where the determination of whether the criteria for an award of attorney fees and costs in this context have been satisfied amounts to statutory construction and a question of law." (*Ibid*; see also *Ramos v. Countrywide Home Loans* (2000) 82 Cal.App.4th 615, 621 [determination of whether legal criteria for an award of attorney fees and costs have been met is a question of law]; *Topanga and Victory Partners v. Toghia* (2002) 103 Cal.App.4th 775, 779-780.)

Because in this case the court stated no reasons for its attorney fee decision, we pay particular attention to the settled appellate principle that "[a] judgment or order of the lower court is presumed correct [and] [a]ll intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an

ingredient of the constitutional doctrine of reversible error.' " (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564, italics omitted.) When the standard of review is abuse of discretion, it is the appellant's burden " 'to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.' " (*Id.* at p. 566.)

II. *The Probate Court Lacks Subject Matter Jurisdiction To Award Contractual Attorney Fees and Non-Appellate Costs*

Trustee contends the probate court erred in concluding that it lacked subject matter jurisdiction to consider his attorney fee request. He distinguishes his fee request from Madeleine's section 664.6 motion, maintaining the fee request did not seek to enforce the settlement agreement but only sought recoverable costs of suit, which the probate court assertedly had jurisdiction to award "as part of its order disposing of the Section 664.6 Motion."⁵ To support this contention, Trustee reasons: a court otherwise without

⁵ In his reply brief, Trustee argues this court did not hold the probate court lacked jurisdiction over the settlement agreement itself, only that it lacked jurisdiction to enforce the settlement agreement *under the section 664.6 motion procedures* because the litigation had been dismissed without the trial court having retained jurisdiction *for that purpose*. He maintains that for purposes of determining the probate court's jurisdiction, the "subject matter" of the attorney fee request is entirely different from the "subject matter" of the section 664.6 motion. Trustee fails to point out that our holding also recognized that after the withdrawals with prejudice of the parties' probate petitions, the probate court did not retain jurisdiction in any manner over the parties' disputes. (*Paulson v. Paulson, supra*, D044801 ["The record here does not contain a clear and unambiguous request that the probate court retain jurisdiction following entry of the required withdrawals with prejudice or any indication that the probate court otherwise retained jurisdiction over the parties' dispute"].)

jurisdiction has jurisdiction to determine its own lack of jurisdiction and enter judgment; an award of costs of suit to the prevailing party is an incident of such a judgment, which accordingly is within the court's jurisdiction to enter.

This court has previously held, and it is binding law of the case on this appeal (*People v. Barragan* (2004) 32 Cal.4th 236, 246; *Clemente v. State of California* (1985) 40 Cal.3d 202, 211), that the probate court was without fundamental subject matter jurisdiction to consider Madeleine's section 664.6 motion and summarily enforce the parties' settlement agreement. "The principle of 'subject matter jurisdiction' relates to the inherent authority of the court involved to deal with the case or matter before it." [Citation.] Thus, in the absence of subject matter jurisdiction, a trial court has no power 'to hear or determine [the] case.' [Citation.] And any judgment or order rendered by a court lacking subject matter jurisdiction is 'void on its face' " (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 196; see also 2 Witkin, Cal. Procedure (4th ed. 1996) Jurisdiction, § 10, p. 555.) " '[A]n act beyond a court's jurisdiction in the fundamental sense is void; it may be set aside at any time and no valid rights can accrue thereunder' Stated another way, '[s]ubject matter jurisdiction of California courts (i.e., competence of a court to adjudicate a particular civil action) is governed by the state constitution and by statute [¶] Unlike personal jurisdiction, subject matter jurisdiction cannot be conferred on a court by consent of the parties, waiver, or estoppel. A judgment rendered by a court that does not have subject matter jurisdiction is void and unenforceable and may be attacked anywhere, directly or collaterally, by parties or by strangers.' " (*Marlow v. Campbell* (1992) 7 Cal.App.4th 921, 928.)

Fundamental principles underlying cost awards defeat Trustee's arguments. Because, as Trustee argues, an award of costs is only incident to a judgment, where a court is without jurisdiction to enter a judgment, it is without authority to enter an award of costs. "[T]here can be no judgment for costs, except as a part of the judgment upon the issues in the action . . . they are but an incident to the judgment, and if the court loses power to render a judgment between the parties upon the issues before it, it is equally powerless to render a judgment for the costs incurred therein." (*Gutting v. Globe Indem. Co.* (1931) 119 Cal.App. 288, 289; *Begbie v. Begbie* (1900) 128 Cal. 154, 155-156; 7 Witkin, Cal. Procedure (4th ed. 1997) Judgment, § 87, p. 617 ["Costs are an incident of the judgment, and ordinarily cannot be recovered except as part of a final judgment on the issues. Thus, if the court has no jurisdiction to render judgment, an award of costs is improper"].) This proposition was recognized by the court in *Wells Fargo & Co. v. City and County of San Francisco* (1944) 25 Cal.2d 37, 44, cited by Trustee for the proposition that a court has authority to award costs as an incident to a judgment. (*Ibid.*) Trustee fails to point out that in *Wells Fargo*, the California Supreme Court specifically observed that "the [trial] court had jurisdiction of the person and subject matter" before reading its holding. (*Ibid.*)

Trustee's other arguments are similarly unpersuasive. We have no quarrel with the proposition that a court has jurisdiction to determine its own jurisdiction. However, that proposition does not address the question of whether a court, having determined it lacks jurisdiction, can then take further action such as entering a judgment. None of Trustee's cited authorities, *Abelleria v. District Court of Appeal* (1941) 17 Cal.2d 280, *Bernardi v.*

City Council (1997) 54 Cal.App.4th 426 or *Marriage of Lusby* (1998) 64 Cal.App.4th 459, involve circumstances in which a trial court entered judgment and awarded costs after finding it lacked subject matter jurisdiction over a matter, and those decisions do not stand for the proposition that a trial court determining that it lacks subject matter jurisdiction over a matter may thereafter do so. Indeed, the law is to the contrary. " 'A judgment rendered by a court that does not have subject matter jurisdiction is void and unenforceable and may be attacked anywhere, directly or collaterally, by parties or by strangers.' " (*Marlow v. Campbell, supra*, 7 Cal.App.4th at p. 928.) The trial court's only possible action after such a determination is to dismiss the action. (E.g. *American Vantage Companies v. Table Mountain Rancheria* (2002) 103 Cal.App.4th 590, 595 ["once the trial court determined that it too lacked [subject matter] jurisdiction, dismissal was its only logical choice"].)

As stated, Trustee maintains, without any supporting authority, that his fee request did not seek to enforce the settlement agreement. But this argument misunderstands the nature of a cost award for attorney fees based upon a contractual attorney fee provision under Civil Code section 1717. In *Santisas v. Goodin* (1998) 17 Cal.4th 599 (*Santisas*), the court explained the relationship between the cost statutes and recovery of contractual attorney fees as costs under Civil Code section 1717. It pointed out that cost recovery is governed by Code of Civil Procedure section 1032, which provides that " '[e]xcept as otherwise provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding,' " and that a " 'defendant in whose favor a dismissal is entered' " is a prevailing party under that statute. (*Santisas*, at p. 606, quoting Code Civ.

Proc., § 1032, subds. (a)(4), (b).) A prevailing party entitled to costs under this statute, however, is not automatically entitled to attorney fees as costs. As *Santisas* further explained, "attorney fees are 'allowable as costs under [Code of Civil Procedure] section 1032' when they are 'authorized by' either 'Contract,' 'Statute,' or 'Law.'" Thus, recoverable litigation costs do include attorney fees, *but only when the party entitled to costs has a legal basis, independent of the cost statutes and grounded in an agreement, statute or other law*, upon which to claim recovery of attorney fees. Accordingly, the seller defendants may recover their attorney fees as costs *if, but only if, the seller defendants have an independent legal basis for the recovery of attorney fees.*" (*Santisas*, 17 Cal.4th at p. 606, italics added.)

In the face of the defendants' contentions in that case that they had a contractually based right to attorney fees, the *Santisas* court proceeded to determine "whether it has been established that the parties entered into a valid and *enforceable* real estate purchase agreement that contains an attorney fee provision and, if so, whether this provision entitles the seller defendants to recover their attorney fees following the voluntary dismissal of plaintiff's action." (*Santisas, supra*, 17 Cal.4th at p. 607, italics added.) In *Santisas*, it was undisputed that the parties had entered into a purchase agreement that included an express provision for attorney fees; the court observed that "no issue has been raised regarding the validity or enforceability of either the agreement as a whole or its attorney fee provision." (*Id.* at pp. 607-608.)

Having determined that the parties entered into a facially valid and enforceable attorney fee provision, the *Santisas* court turned to the question of whether the

contractual attorney fee provision entitled the defendants to recover their attorney fees following the action's voluntary dismissal, and also whether the defendants were the "prevailing parties" under their own agreement. The court answered both in the affirmative. (*Santisas, supra*, 17 Cal.4th at pp. 608-609.) It resolved these questions in order to reach the main issue at hand, namely, whether Civil Code section 1717 precluded such recovery where the plaintiffs had voluntarily dismissed their action against the defendants with prejudice. Concluding that recovery was precluded only for contract but not for tort or other noncontract claims, the court rejected the plaintiffs' argument that attorney fees under a contractual attorney fee provision may be recovered as costs only when expressly allowed under the terms of section 1717, and that attorney fees incurred to litigate tort or other noncontract claims could not be recovered as costs under a contractual attorney fee provision. (*Santisas*, at pp. 617-618.) In doing so, it explained that the Legislature recognized that attorney fee claims under Civil Code section 1717 are based in part on a contractual provision and in part on a statute (Civil Code 1717), but "[t]o avoid any uncertainty about the proper classification of [Civil Code] section 1717 attorney fees claims, the Legislature specified they should be regarded as claims based on a contract." (*Santisas*, at pp. 618-619.)⁶

⁶ The court's conclusion was based on the last sentence of Code of Civil Procedure section 1033.5, subdivision (a)(10), which reads: "Attorney's fees awarded pursuant to Section 1717 of the Civil Code are allowable costs under Section 1032 as authorized by subparagraph (A) of paragraph (10) of subdivision (a)." The *Santisas* court interpreted this sentence as providing that for the purpose of determining the available procedural methods of fixing attorney fees, "attorney fee claims under section 1717 are to be treated

We are persuaded that under *Santisas*, a request for Civil Code section 1717 attorney fees based on a contractual attorney fee provision is grounded in enforcement of the contract at hand containing the attorney fee clause – in this case, the parties' settlement agreement – not on the cost statutes. The probate court correctly concluded, implicitly, that lacking jurisdiction over the parties' efforts to enforce the settlement agreement, it was required to deny Trustee's contractual attorney fee request.

Finally, Trustee unpersuasively points to this court's award of appellate costs as support for the proposition that the trial court had jurisdiction to award contractual attorney fees as costs. This court's award of costs on appeal cannot be interpreted as any indication of the probate court's ability to award costs. This court had jurisdiction to review the probate court's determination as to Madeleine's section 664.6 motion, and in connection with that, award costs on appeal. Our appellate cost award says nothing about whether the probate court had subject matter jurisdiction to consider Trustee's attorney fee request for defending Madeleine's section 664.6 motion.

Madeleine relies upon *Wackeen v. Malis*, *supra*, 97 Cal.App.4th 429 to support her assertion that the probate court lacked subject matter jurisdiction over Trustee's request for attorney fees and non-appellate costs. We need not decide whether that case, in which the defendants sought to enforce an attorney fees clause in a settlement agreement via a section 664.6 motion (*Wackeen v. Malis*, at pp. 436-437), is directly on point here.

as claims based on contract rather than claims based on statute." (*Santisas*, 17 Cal.4th at p. 618.)

DISPOSITION

The order is affirmed.

O'ROURKE, J.

WE CONCUR:

NARES, Acting P. J.

McDONALD, J.